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No. 86-405

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

HAMID R. KASHANI, *Petitioner*,
v.
ALAN C. NELSON, Commissioner of the Immigration and Naturalization Service, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONER'S REPLY BRIEF

December 3, 1986

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REPLY ARGUMENT

A. UNDER THE ADMINISTRATIVE PROCEDURE ACT, A DISTRICT DIRECTOR'S ASYLUM DENIAL IS JUDICIALLY REVIEWABLE.

The Administrative Procedure Act (APA) defines administrative decisions subject to judicial review:

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise

> final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

APA § 10(c), 5 U.S.C. § 704. Thus, under the APA, a district director's asylum denial is reviewable, because:

1. Under the APA, the district director's asylum denial is a final action. Commissioner's own regulation attests to this: "Appeal. No appeal shall lie from the decision of the district director [denying asylum]." 8 C.F.R. § 208.8(c) (1986); Haitian Refugee Center (H.R.C.) v. Civiletti, 503 F. Supp. 442, 467 (S.D. Fla. 1980), aff'd as modified sub nom. H.R.C. v. Smith, 676 F.2d 1023 (5th Cir. 1982).

2. Even if a district director's asylum denial is not a final action, it is still judicially reviewable because it cannot be raised on review of a later agency action. The prior decision of a district director would not be directly reviewable on judicial review of a deportation proceeding. Gornicka v. INS, 681 F.2d 501, 503 (7th Cir. 1982). Thus, the district director's

asylum denial is reviewable by a district court, since it "cannot be raised upon judicial review of later order of agency." Borden, Inc. v. Federal Trade Comm'n., 495 F.2d 785, 787 (7th Cir. 1974).

3. Further, a district director's asylum denial is judicially reviewable because it cannot be appealed to a "superior agency authority." Also, there are no INS regulations requiring that the adverse effects of a district director's asylum denial be withheld for any period— nor does Commissioner cite any. In fact, the INS does not hold "inoperative" the adverse effects of the district director's denial, even if the alien eventually renews his asylum application with an immigration judge and even if the immigration judge actually grants him asylum. See Pet. at 4-5.

B. SINCE THE ENACTMENT OF THE REFUGEE ACT OF 1980, DISTRICT COURTS HAVE JURISDICTION, UNDER INA § 279, TO REVIEW DISTRICT DIRECTORS' ASYLUM DENIALS.

Section 279 of the INA, 8 U.S.C. § 1329 (1982), vests the district courts with jurisdiction to review questions arising under the second subchapter (title II)

of the INA, i.e. INA §§ 201-293, 8 U.S.C. §§ 1151-1363. Prior to 1980, asylum applications were made and decided under INA § 103, 8 U.S.C. § 1103, which is a part of the first subchapter (title I) of the INA. Thus, in Chen Chaun-Fa v. Kiley, 459 F. Supp. 762, 764 (S.D. N.Y. 1979), the Court held that it lacked jurisdiction to review the district director's asylum denial. In 1980, Congress changed this situation, when it enacted the Refugee Act of 1980, codified in part at INA § 208, 8 U.S.C. § 1158 (1982) (Asylum procedure), as a part of the second subchapter (title II) of the INA.

> Whatever complications holdings like Chen Chaun-Fa may introduce upon occasion, most immigration disputes do arise under title II of the INA. Thus, most of the time a plaintiff seeking relief in the district court will have little difficulty invoking jurisdiction under either § 279 or 28 U.S.C.A. § 1331- or both- provided only that she is not directly challenging an exclusion or deportation order, for which § 106 unambiguously provides exclusive review channels.

T. Aleinikoff and D. Martin, Immigration Process and Policy 589 (1985).

Commissioner cites H.R.C. for the proposition that when the merits of a district director's asylum denial

are at issue, the alien must first seek withholding of deportation before an immigration judge. Opposition Brief at 8-9. The quotation in Commissioner's brief is really a discussion of Chen Chaun-Fa. In fact, the Fifth Circuit doubted the wisdom of Chen Chaun-Fa: "However wise or correct requiring exhaustion of the optional § 1253(h) remedy may be when an alien seeks a review on the merits of the asylum determination, the instant case, in which it has been found that the procedures employed frustrated any merits determinations, is distinguishable, and we refuse to mandate exhaustion of the optional remedy." H.R.C., 676 F.2d at 1035-36. Whatever the wisdom of Chen Chaun-Fa might have been when it was decided, today it has no significance— because of the 1980 enactment of INA § 208, 8 U.S.C. 1158, as a part of the second subchapter of INA.

C. THE DECISION OF THE SEVENTH CIRCUIT, BELOW, CANNOT BE RECONCILED WITH THE PRIOR DECISIONS OF THIS COURT.

Commissioner argues that Cheng Fan Kwok v. INS, 392 U.S. 206 (1968), and INS v. Stanisic, 395 U.S. 62, 68

n.6 (1969), are no longer good law because of the Refugee Act of 1980. Opposition Brief at 4. Commissioner's argument is without merit, because there are no provisions in the Refugee Act of 1980 which contradict the prior decisions of this Court— and Commissioner does not cite any. These cases are still good law and cannot be reconciled with the decision below.

D. THE SEVENTH CIRCUIT'S DECISION, BELOW, CANNOT BE RECONCILED WITH THE DECISIONS OF THE OTHER COURTS OF APPEALS.

1. Commissioner makes much of the fact that in Cheng Fan Kwok, and Salehi v. District Director, INS, 796 F.2d 1286 (10th Cir. 1986), aliens brought their complaint to a district court after their deportation proceedings were completed. Opposition Brief at 6. A district director's decision does not become any more justiciable by haling the alien into a deportation proceeding, because Commissioner's own regulation prohibits the immigration judges, as well as the Board of Immigration Appeals (BIA), from reviewing a district director's decisions. H.R.C., 676 F.2d at 1035

("[I]mmigration judges and the BIA have no authority to review actions of the district director.").

2. Commissioner tries to distinguish Yiu Sing Chun v. Sava, 708 F.2d 869 (2d Cir. 1983), claiming that there the district court's jurisdiction was based upon INA § 106(b), 8 U.S.C. § 1105a(b), which authorizes habeas corpus actions brought in district courts for review of final exclusion orders, a situation not present in the instant case. Opposition Brief at 7 n.4. However, INA § 106(b), only authorizes judicial review of final exclusion orders entered in the course of exclusion proceedings conducted under INA § 236, 8 U.S.C. § 1226. Thus, a district court's jurisdiction to review the separate decisions of the district directors must— and in Yiu Sing Chun did— flow from its own independent sources, such as 8 U.S.C. § 1329 or 28 U.S.C. § 1331.

3. With respect to H.R.C., Medina v. Castillo, 627 F.2d 972 (9th Cir. 1980), and Fleurinor v. INS, 585 F.2d 129 (5th Cir. 1978), Commissioner's assertion that, under the then-prevailing regulations, an alien "could not renew his application in deportation or exclusion proceedings" is untrue. See Opposition Brief at 8. The

regulations actually required:

> Under the regulations in force during the time period at issue in this lawsuit, the plaintiffs had a right to have their asylum applications considered by the District Director, whose decision was unreviewable within INS. 8 C.F.R. §§ 108.1 & 108.2. A District Director's denial of asylum would not preclude the alien from applying for asylum during the course of a later deportation hearing before an immigration judge. 8 C.F.R. § 108.2.

H.R.C., 503 F. Supp. at 463-64 (emphasis added).

4. Commissioner also tries to distinguish H.R.C. and Jean v. Nelson, 727 F.2d 957 (11th Cir. 1984), aff'd, ___ U.S. ___, 105 S. Ct. 2992 (1985), noting that in those cases aliens complained of the district director's asylum denial on procedural grounds, whereas here Kashani's complaint is on the merits. Opposition Brief at 9. Commissioner's distinction between review of procedural infirmities and review on the merits only relates to the question of in which court the asylum decisions of the immigration judges may be reviewed. In H.R.C. and Jean, the Courts held that when procedural infirmities during the deportation proceedings reveal a "pattern of practice," the aliens may seek judicial

review in a district court. See Pet. at 10-12. Commissioner's distinction, thus, is inapplicable when review of a district director's decision is sought.

E. INTRACIRCUIT CONFLICTS ARE IMPORTANT FACTORS IN DECIDING WHETHER TO GRANT CERTIORARI.

Intracircuit conflicts, see Pet. at 16, are important factors in deciding whether to grant certiorari. Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 508 (1950) (granting certiorari "because of this intracircuit conflict"); John Hancock Ins. Co. v. Bartels, 308 U.S. 180, 181 (1939) (granting certiorari due to intracircuit conflict and significance of the question).

CONCLUSION

For the foregoing reasons, Petitioner Hamid R. Kashani respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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